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IN THE

Supreme Court of the United States

October Term, 1968

No. 586

ROMEO TRUJILLO-M,

Petitioner,

—against—

THE BANK OF NOVA SCOTIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK; FIRST DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK; FIRST DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the order of affirmance of the Appellate Division, First Department of the Supreme Court of the State of New York and the judgment of affirmance dated and entered on March 26, 1968 in the office of the clerk of New York County, leave to appeal from which was denied by the Court of Appeals of the State of New York by order made July 2, 1968.

Citation to Decision Below

Trujillo v. *Bank of Nova Scotia,* 51 Misc. 2d 689, 273 N. Y. S. 2d 700 affd. 289 N. Y. S. 2d 389. The Supreme Court decision is set forth in the certified copy of the appendix constituting the record in the Appellate Division at pp. A79 to A84 and is annexed hereto.

Jurisdiction

The order of the Appellate Division, First Department of the Supreme Court of the State of New York, affirming an order of the Supreme Court, New York County which granted summary judgment in favor of respondent and against petitioner dismissing petitioner's complaint was made on February 20th, 1968. A judgment on such order of affirmance was entered on March 26, 1968. Leave to appeal from such order and judgment of affirmance was denied by the Court of Appeals of the State of New York by order dated the 2nd day of July, 1968 and is annexed hereto.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. Section 1257(3).

Petitioner having asserted below and asserts here that he has been deprived of his rights secured by the Constitution of the United States; that N. Y. Banking Law, Sec. 204a(3)(a) is unconstitutional if construed to be retrospective and that it is also repugnant to the laws of the United States.

Questions Presented

1. Is the N. Y. Banking Law, Sec. 204a(3)(a) unconstitutional with respect to or inapplicable to bank deposits made before its passage because it is violative of the "Due Process" Clause of the 14th Amendment to the U. S. Constitution?

2. Does the N. Y. Banking Law, Sec. 204a(3)(a) conflict with the Foreign Assistance Act of the United States (22 U. S. C. A. 2370)?

3. Has the State Court herein decided this case in a manner which is in conflict with the meaning and intent to be given the *Sabbatino case* (376 U. S. 398), thus confusing existing Federal Law with respect to the "Act of State Doctrine"?

4. Is the N. Y. Banking Law, Sec. 204a(3)(a) unconstitutional because it is in violation of "Equal Protection of the Laws" Clause of the 14th Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. The case involves the "Due Process Clause" and the "Equal Protection of the Laws" Clause of the First Section of the Fourteenth Amendment to the Constitution of the United States.

2. The case involves the following statute of the State of New York:

a) N. Y. Banking Law, Sec. 204a(3)(a) which reads as follows:

"(a) ... . any foreign banking corporation doing business in this state under a license issued by the superintendent in accordance with the provisions of this chapter shall be liable in this state for contracts to be performed at its office or offices in any foreign country, and for deposits to be repaid at such office or offices, to no greater extent than a bank, banking corporation or other organization or association for banking purposes organized and existing under the laws of such foreign country would be liable under its laws. The laws of such foreign country for the purpose of this subdivision shall be

deemed to include all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power of any kind at the place where any such office is located, whether or not such dominant authority be recognized as a de facto or de jure government."

* * * * *

3. The case involves the following statute of the United States:

a) The Foreign Assistance Act as amended in 1964 (22 U. S. C. A. 2370) which reads as follows:

"(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case

by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

Statement of the Case

Petitioner was formerly a resident of the Dominican Republic. He was related to Rafael L. Trujillo Molina, its president. He was not engaged in politics and had no political office. He was a businessman and as such, over the years, had been involved in various business and real estate activities which brought him substantial assets and a substantial estate. In 1928 or 1929 he opened an account with the respondent in its Santo Dominican branch. The account was maintained continuously until the overthrow of the government in May 1961, at which time petitioner as well as many other people who were not favored by the incoming military regime, fled the country. Petitioner came to Florida where he is now a resident. Thereafter and until December of 1961, he issued checks drawing funds upon the defendant bank in various amounts which checks were honored. On November 27, 1961, he drew a check in the amount of $25,000. which was dishonored. *Thereafter* and on December 29, 1961, the constitution of the Dominican Republic was amended enlarging the grounds upon which confiscation of property by the state may be effected. In accordance with this constitutional amendment and on January 4, 1962, a statute was passed by which the property of a great many individuals was confiscated, which, without distinction included all relatives to the 4th degree of consanguinity. Confiscation included the property of the petitioner. All of the real estate of the petitioner was so confiscated as well as other business interests. However, in addition to confiscating the property of the peti-

tioner, the Dominican Republic made a demand upon the respondent bank to pay to the government the amount by which it was indebted to the petitioner. Without further action, Court order or challenge, the respondent made such payment.

There was no "act, decree, regulation . . . or order." There was no "promulgation or enforcement" of anything. There was nothing more than a letter and the payment was made.

Under the Constitution in effect on December 29, 1961, confiscation of property of a private individual was permitted only for certain crimes such as treason during war time. To be subjected to that penalty the accused must be tried and the facts established to justify the confiscation. On December 29th the constitution was amended adding another ground—where a public official usurped the power of his office to enrich himself or his relatives and friends, his property could be confiscated.

Petitioner submitted the affidavit of a distinguished member of the bar of the Dominican Republic as to the meaning of the amendment and its applicability to the case at bar. He concluded:

1. Confiscation applies only as to the property of one in office;
2. There would have to be a trial and a finding of guilt as to the person accused;
3. No litigation was ever instituted against the petitioner and no finding that he usurped or abused anything;
4. Petitioner never held public office;
5. The confiscatory statute passed pursuant to the amended constitution merely recited that *some* rela-

tives enriched themselves without finding which ones did in accordance with the provisions of the constitution;

6. The Francisco decision in the Dominican Republic does not apply since that case was against the government and merely sought to declare the statute itself void. It did not seek to establish the claim that it had no application in the case of the petitioner. No facts were set forth in that case to justify the conclusion that it did not apply to the petitioner.

The uncontroverted facts in the within case shows petitioner was never in politics; he amassed his wealth long before the rise to power of Rafael L. Trujillo Molina and that he never received any of his money from the government.

How the Questions Were Raised and Decided Below

There was no trial of any of the issues herein. Respondent moved for summary judgment which motion was granted. The Appellate Division of the Supreme Court of the State of New York affirmed such decision without rendering any opinion. Leave to appeal to the Court of Appeals was also denied without opinion. All of the questions presented herein were raised for the first time on the motion for summary judgment in both the affidavits and briefs of both sides. The same issues were then argued in the Appellate Division.

REASONS FOR GRANTING THE WRIT

POINT I

N.Y. Banking Law Sec. 204a (3)(a) is either inapplicable to or unconstitutional with respect to bank deposits made before its passage.

The lower Court ruled that it was prohibited from consideration of the claim of the plaintiff by reason of the provisions of §204a (3)(a) of the N.Y. Banking Law.

The section, in substance, states that a foreign banking corporation shall be held liable here on contracts to be performed in a foreign country to no greater extent than a bank would be liable under the laws of that foreign country. It is urged that this Statute was misconstrued by the Courts and that it does not preclude recovery in this case.

A. *The Section is unconstitutional with respect to prior bank deposits*

Retroactive laws impairing the obligation of contracts are unconstitutional.

> *Bay* v. *Gage,* 36 Barb 447;
> *California Fed. Savings* v. *Allen,* 112 P. 2d 959;
> *Kentucky Utilities* v. *Carlisle,* 131 S.W. 2d 499;
> *Anderson* v. *Board of Education,* 61 N.E. 2d 562;
> *Yaffe* v. *International Co.,* 80 So. 2d 910;
> *State* v. *Caldwell,* 178 S.W. 2d 624, 151 A.L.R. 1410.

In the absence of such clear statement that the statute is retroactive it will be construed to have no retrospective effect.

Lavieri v. *Ulysses,* 180 A. 2d 632;
Herrick v. *Saylor,* 245 F. 2d 171;
Conn v. *Young,* 677 F. 2d 725;
Field v. *Witt Tire,* 220 F. 2d 74;
Theodosis v. *Keishin Motor,* 92 N. E. 2d 794.

In the present case the rights of the parties were determined at the time petitioner opened up his bank account with the respondent in 1928 or 1929. Deposits and withdrawals over the years did not change that relationship. The N.Y. Banking Law §204a (3)(a) was not passed until 1941. It must be presumed to have only prospective effect with no effect upon rights which were fixed years before. A contract will be upheld wherever possible. This is the rule amongst almost all civilized nations.

Bartolus, Conflict of Laws, pp. 30-2;
Corbin, Contracts, §546;
Allgemeines Landrecht Fur Die Preussischen, I Title 5, §113;
Wharton, Conflict of Laws, 3rd Ed. 1905, §945;
Kossick v. *United Fruit,* 365 U. S. 731;
Pritchard v. *Norton,* 106 U. S. 124;
Abortiz & Co. v. *Price,* 99 Fed. Supp. 602;
Southwestern v. *National Bank of N. Y.,* 6 N. Y. 2d 454.

B. *The section does not apply because respondent would have been liable under Dominican Law*

In defining what it (the section) meant by foreign "laws," it included all acts, decrees, etc., "promulgated or enforced." That did not take place in the present case. There was no "promulgation" of any decree or order of any authority and it certainly was never "enforced." All that happened was that the Superintendent of Banking wrote a letter requesting that the funds on deposit to the credit

of the petitioner be turned over to the State. That was done without objection, without challenge, without court order. The letter request does not come within any of the listed instrumentalities which are "acts, decrees, regulations and orders."

The section provides that a foreign bank may not here be held to greater responsibility than what would have existed in the foreign jurisdiction. The lower Court ignored this question completely and assumed that there was no liability in the Dominican Republic. Since this section attempted to change common law (assuming that it so intended), it must be strictly construed. It did not say that the controlling question was as to what did in fact happen elsewhere. It made the determining question as to what the bank's legal liability was under such foreign laws. What that law was as to the bank's liability in the Dominican Republic was something to be left to a trial.

POINT II

The N.Y. Banking Law Sec. 204a (3)(a) conflicts with the Foreign Assistance Act and is thus void.

The Foreign Assistance Act was amended in 1964 (22 U. S. C. A. 2370) so as to provide that no court may decline to make a decision on the merits "giving effect to the principles of international law . . ." by reason of the Act of State Doctrine. It applies to any "taking after January 1, 1959." There is an exception. This exists when the President determines that the Act of State Doctrine should be applied by virtue of the foreign policy interests of the United States and a certification to that effect must be filed with the court. In the present case this does not exist. In fact, petitioner has filed with his papers a state-

ment of the State Department that it has no interest (letter of February 8, 1965—A72).

Although it is urged that the committee report states that the amendment to the act did not intend to deprive the banks of their ability to use the act of state doctrine as a defense, it is questionable whether the banks are immune from its effects. Statements in the committee were on both sides of this position. It is thus general in its character. Much has been written concerning the *Sabbatino* decision, all of which indicates that it should be confined to the specific facts there involved. Its implications were broad. Andreas F. Lowenfeld, Deputy Legal Advisor for the Department of State, writing in the American Journal of International Law, Vol. 59, about the *Sabbatino* decision said:

> "... and since the statute [Foreign Assistance Amendment] plainly seeks to reverse this ..."

He questioned whether there could be a distinction between a claim to the assertion of title to property and a chose of action saying:

> "... why should there be a difference between an action in the nature of replevin and an action in the nature of damages for conversion."

and again:

> "Finally, does the breach of contract ... give rise to a property claim, as contrasted with a claim for damages? So far as this writer is aware no American Court has poised that question."

He concluded:

> "Thus it is simply not clear whether the statute, as it now stands, does or does not extend to persons who

do not assert title to the specific property before the Court."

If there were no other question in the present application, the writ should issue to permit this question to be answered. The *Sabbatino* case also does not answer the question as to whether the doctrine applies in cases such as this which do not involve "specific property."

Similarly, Prof. Wolfgang Friedman of Columbia University, writing in 34 George Washington Law Review concerning the *Sabbatino* decision stated that the philosophy of international relations urged by the legislature is the principle of "full prompt and adequate compensation. . . ." He then comments:

> "That this view is carried further by the congressional amendment directing the courts not to refuse 'determination on the merits, giving effect to the principles of international law.'"

The statute refers to the requirement that courts must give effect to the principles of international law where it involves a "right of property." It is urged this is general and applies to all "property" including contract rights. That this is so is supported by the exception in the amendment to wit: property acquired by a letter of credit. If there was no intention to cover all property rights including contractual rights there would be no need to exclude from its operation "a letter of credit."

POINT III

The decision below conflicts with the intent of the *Sabbatino* case and distorts its meaning.

The lower court herein has so construed the decision of this Court in the case of *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 that there is a blind acceptance of the act of anyone—governmental agency, a clerk, a private bank or corporation or for that matter almost anyone—just so long as the act takes place in a foreign country. The *Sabbatino* case, *supra*, did not go that far. The "Act of State Doctrine" discussed in the case was more clearly defined under a given set of circumstances. It did not establish a brand new doctrine.

It is important that the nature of the dispute be reviewed to determine whether judicial review is proper.

The most important question which has to be considered in determining whether the judicial will assume jurisdiction of the problem, is that of *title*. This was the thread which ran through the entire *Sabbatino* decision. The case involved, as did others supporting confiscatory decrees, the *actual seizure of property* and thus the question as to the *title* to the property seized arises.

In this case the lower court held there was no distinction between the seizure of property and that of a contractual right. Petitioner contends that the *Sabbatino* case did make a distinction and that in any event the Foreign Assistance Act Amendment reaffirmed petitioners' position on this point.

In the present case, the executive branch of the government has no particular interest. It has no stated parties.

The Courts have, since the *Sabbatino* case, indicated that the doctrine must be restricted to the facts there particularly applicable. The Court referred to this limitation in the *Sabbatino* decision (437) stating that only these facts justify the present conclusion:

> "• • • maintaining the act of state doctrine in this realm of its application."

See also:

> *Victory Transport Inc.* v. *Commisseria Generale*, 336 Fed. 2d 354;
> *Flota Maritinia Browning de Cuba* v. *Motor Vessel Cindad*, 355 Fed. 2d 619.

In the *Flota* case, *supra*, the Court refused to follow the claim urged that the *Sabbatino* case was applicable, stating:

> "Applicability of the act of state doctrine under these circumstances does not necessarily suggest applicability of the doctrine of sovereign immunity to Cuban property arrested in this country, when the Department of State has manifested no interest in it."

Thus it appears that in the *Flota* case there was no seizure of property physically and that the State Department expressed no interest in the confiscatory decree involved.

In the present case all that is involved is a debt, a contractual right. There could be no seizure and title to it is not in question.

POINT IV

N.Y. Banking Law Sec. 204a (3)(a) is unconstitutional as violative of the "Equal Protection Clause" of the 14th Amendment to the Constitution of the United States.

Our common law and our public policy dictates that there shall be just and adequate compensation for the taking of property. In recent times this has not always occurred in foreign countries, in the sense that some administration in power has confiscated the property of its residents or citizens. Principles of international law have been applied by tribunals when issues relating to such confiscation have been submitted to them. A bank was in no different position than any other entity appearing before such tribunal. This section seeks to alter this concept. It places the bank in a favored status, even though it is mandatory under our constitution that all be treated alike.

The situation becomes more complex in light of the fact there is nothing that anyone "seizes " from a bank. Whose property is it? The bank's or the depositor's? It is thus a simple matter for the bank to just give away money which it labels as belonging to the depositor without regard to its contract with the depositor. No one else is given that privilege under the statute, assuming that it was proper to do so at all.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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